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## SECTION 700 – WATER QUALITY/SURFACE WATER

### SECTION 710.00 – INTRODUCTION

This section includes information and requirements for water quality, erosion and sedimentation control, surface water, storm water runoff, fill material in wetlands, and construction erosion control and runoff. It focuses mainly on road projects. Policies, procedures, and permit requirements specific to ferries, airports, rail, and non-motorized transport are addressed in [Section 770.01](#).

**710.01 Summary of Requirements.** Water quality and other surface water issues that must be addressed during development of ITD projects include storm water discharge, work on shorelines or in floodplains, interference with stream flows, use of herbicides, water rights and construction in floodplains, water, or other critical areas. References, documents, MOUs, permits, certificates, and approvals included in this section provide background relevant to the ITD discipline report checklists for water quality.

Water quality standards are implemented through Clean Water Act (CWA) Section 401 permits. Applications for water quality related permits include the National Pollutant Discharge Elimination System (NPDES) permits. Water-related permits, certificates, and approvals are described in [Section 760.00](#). See also [Section 1160.00](#).

The listing of salmonids under the Endangered Species Act (ESA) has triggered the development of new requirements for water quality issues. Planning processes under the ESA, CWA, and NEPA are becoming increasingly integrated. The Environmental Protection Agency (USEPA), Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), U. S. Army Corps of Engineers (COE) and state Department of Environmental Quality (DEQ) are working to ensure that Idaho's water quality permits and procedures meet the goals and requirements of the ESA. As a result, regulations related to threatened and endangered salmonids are in the process of being incorporated into permits related to the CWA. In turn, ITD is incorporating ESA-related issues into its water quality procedures and design standards.

**710.02 Abbreviations and Acronyms.** Abbreviations and acronyms used in this section are listed below. Others are found in the general list in the appendix.

401 Certification	Clean Water Act Section 401 Water Quality Certification
303d Certification	Clean Water Act Section 303d Water Quality Cert.
AKART	All known, available, and reasonable methods of prevention, control, and treatment
BMP	Best Management Practice
COE	U.S. Army Corps of Engineers
CWA	Clean Water Act
DEQ	Idaho State Department of Environmental Quality
EPHA	Environmental Protection Health Act
ITD	Idaho Transportation Department
DOH	Department of Health
ESA	Endangered Species Act
FEMA	Federal Emergency Management Agency

HWMA	Hazardous Waste Management Act
LOP	Letter of Permission
MHHW	Mean Higher High Water
MS4	Separate Municipal Storm Sewer System
NMFS	National Marine Fisheries Service
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
NRCS	Natural Resources Conservation Service (formerly Soil Conservation Service)
NWP	Nationwide Permit
OHWM	Ordinary High Water Mark
SWPPP	Storm water Pollution Prevention Plan
TMDL	Total Maximum Daily Load
USDA	U.S. Department of Agriculture
USEPA	U. S. Environmental Protection Agency
USFWS	U.S. Fish and Wildlife Service
IDFG	Idaho Department of Fish and Game
WRIA	Water Resource Inventory Area

### 710.03 Glossary.

**Contaminant** – Any physical, chemical, biological, or radiological substance or matter that has an adverse affect on air, water, or soil.

**Herbicide** – A chemical pesticide designed to control or destroy plants, weeds, or grasses.

**Noxious weeds** – Non-native plants that are highly destructive, competitive, and difficult to control or eliminate.

**Pollutant** – Any substance of such character and in such quantities that upon reaching the environment (soil, water, or air), is degrading in effect so as to impair the environment's usefulness or render it offensive.

**Surface Runoff** – Overland flow of water.

**Storm water** – Rainwater that flows over land and into natural and artificial drainage systems..

**Surface Water** – All water naturally open to the atmosphere, such as rivers, lakes, reservoirs, ponds, streams, seas, and estuaries.

**Suspended Sediment** – Fine material or soil particles that remain suspended by the current until deposited in areas of weaker current. Can be measured in a laboratory as “Total Suspended Solids” (TSS).

**Turbidity** – A condition in water or wastewater caused by the presence of suspended material resulting in scattering and absorption of light rays.

**Wastewater** –Water that has been used for some purpose and discarded, or wasted; typically liquid discharged from domestic residential, business, and industrial sources that contains a variety of wastes.

**Watershed** – The land area that drains into a stream; the watershed for a major river may encompass a number of smaller watersheds that ultimately combine at a common poi

***Waters of the United States means:***

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

- Which are or could be used by interstate or foreign travelers for recreational or other purposes; or From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or Which are used or could be used for industrial purposes by industries in interstate commerce.
- All impoundments of waters otherwise defined as waters of the United States under this definition;
- Tributaries of waters identified in paragraphs (g)(1)-(4) of this section;
- The territorial sea; and
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)-(6) of this section.

## **SECTION 720.00 – APPLICABLE STATUTES AND REGULATIONS**

This section lists the primary federal and state statutes applicable to water quality issues. Permits, certifications, and authorizations required pursuant to these statutes are described in [Section 760.00](#).

**720.01 National Environmental Policy Act.** The National Environmental Policy Act (NEPA), requires that all actions sponsored, funded, permitted, or approved by federal agencies undergo planning to ensure that environmental considerations such as impacts on water quality are given due weight in project decision-making. Federal implementing regulations are at 23 CFR 771 (FHWA) and 40 CFR 1500-1508 (CEQ). For details see [Section 200](#).

### **720.02 Federal.**

**720.02.01 Clean Water Act.** The Water Pollution Control Act, better known as the Clean Water Act (CWA), 33 USC 1251 *et seq.*, provides for comprehensive federal regulation of all sources of water pollution. It prohibits the discharge of pollutants from non-permitted sources. The CWA authorizes the USEPA to administer or delegate water quality regulations covered under the act. In Idaho, authority is delegated primarily to COE and the Idaho Department of Environmental Quality (DEQ). USEPA administers CWA implementation on tribal and federal land. Implementation requirements for CWA Sections 303(d), 305(b), 401, 402, and 404 are described in [Section 760.00](#). The law is online at: <http://www4.law.cornell.edu/uscode/> Click on Title 33, then Chapter 26.

**720.02.02 Rivers and Harbors Act.** The Rivers and Harbors Act of 1899, 33 USC 403, prohibits the commencement of any work in traditional navigable waters of the U.S. without a permit from the U.S. Army Corps of Engineers (COE). Section 9 of the Rivers and Harbors Act requires Coast Guard approval for any bridge over navigable waters. The law is online at:

<http://www4.law.cornell.edu/uscode/> Click on Title 33, Chapter 9, Section 403.

**720.02.03 Endangered Species Act (ESA).** This act is administered by USFWS and NMFS. Formal consultation under the act is triggered by a federal nexus including permits, funding or actions on federal land, and by the potential harm, harassment, or take of listed species or impacts to their habitat. Informal consultation under Section 10 of the act requires applicants to comply with the ESA even if a federal nexus does not occur. The ESA has relevance to the water quality section because of listed aquatic species. Please see [Section 1020.01](#) for more details. The law is online at: <http://www4.law.cornell.edu/uscode/> Click on Title 16, then Chapter 35; or USFWS home page: <http://www.fws.gov/>; or NMFS home page: <http://www.nmfs.noaa.gov/>

### **720.03 State of Idaho.**

**720.03.01 State Water Quality Laws and Rules.** Idaho State laws relevant to water quality issues and the rules implementing the code are located at the DEQ web site under Enforcement Procedures Manual: or [Portal to Idaho's Department of Environmental Quality Website](#)

**720.03.02 Clean Water Act State Implementation.** Water quality regulations are mandated by the Federal Clean Water Act (Water Pollution Control Act) described above. Under state statute, discharge of pollutants into waters of the state, is prohibited unless authorized. DEQ issues a Section 401 certificate of water quality compliance for each CWA Section 404 permit.

The Environmental Protection and Health Act of 1972 (EPHA) found at Idaho Code Title 39, Chapter 1, declares that it is the policy of the state of Idaho to provide for the protection of the environment and the promotion of personal health and to protect and promote the health, safety and general welfare of the people of the state. Idaho Code Title 39-102(1) states that the DEQ is empowered to administer the provisions of the EPHA. The EPHA and Hazardous Waste Management Act (HWMA) grant the DEQ the powers and duties to protect the environment through the department enforcement activities.

DEQ also has the authority to issue administrative orders for projects not requiring 404 permits. DEQ administers requirements under CWA Section 401.

The Water Pollution Control Act and state water quality standards are online at: or [Portal to Idaho's Department of Environmental Quality Website](#)

### **720.03.03 Idaho Land Board.**

[NAVIGATIONAL ENCROACHMENTS - 58-1303]

.ENCROACHMENT ON NAVIGABLE LAKES -- POWERS OF STATE LAND BOARD.

(TITLE 58, PUBLIC LANDS CHAPTER 13)

The board of land commissioners shall regulate, control and may permit, encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes as provided herein. (Herein refers to Title 58 of Idaho Code.)

## SECTION 730.00 – POLICY GUIDANCE

### **730.01 ITD Erosion and Sediment Control Manual (BMP Manual).**

See the current BMP Manual on the ITD Roadway Design CD-ROM Publications

**730.02 State Water Quality Policies.** Many publications relevant to state water quality policies are located at DEQ's web site: <http://www2.state.id.us/deq/publist1.htm>

**730.03 U.S. Army Corps of Engineers Water Protection Guidance.** The Corps of Engineers (COE) regulatory program concerns not only the integrity of traditional navigable waters, but also the quality of waters of the United States, from wetlands to the territorial seas. For concise information on COE policies regarding wetlands, see [Section 1100](#). COE regulatory procedures are online at the COE web site: <http://www.nws.usace.army.mil/> Click on Regulatory Branch

## SECTION 740.00 – MOUS, MOAS

**740.01 NEPA/404 Merger.** The agreement, known as the "Section 404 Merger," applies to all transportation projects in the state of Idaho requiring a COE 404 Individual Permit and FHWA action under NEPA. Please refer to [Section 200](#) for more detail on NEPA requirements. The Merger Process is currently under review and may be changed substantially in the near future.

Signatories to this agreement are FHWA, COE, and ITD but other agencies are invited to join the process as non-signatory cooperating agencies whenever it is appropriate. These agencies are committed to integrating the Section 404 permit process and other related permitting and certification procedures in the NEPA process at the transportation planning, programming, and project development stages. A high priority is placed on the avoidance of adverse impacts to waters of the U.S. including but not limited to wetlands, other aquatic resources, and associated sensitive species. The agreement also recognizes the need to consider non-water related impacts and acknowledges that those impacts may affect the decision on the least environmentally damaging practicable alternative.

## SECTION 750.00 – TECHNICAL GUIDANCE

### **750.01 FHWA Guidance.**

**750.01.01 FHWA Technical Advisory.** FHWA Technical Advisory T6640.8A (see [Exhibit 300-4](#)) provides guidelines for preparing environmental documents. For water quality, an environmental document should identify roadway runoff or other non point source pollution that may have an adverse impact on sensitive water resources such as water supply reservoirs, groundwater recharge areas, and high quality streams. The Water Quality Report is structured to meet the requirements of the FHWA Technical Advisory. See FHWA's web site: <http://www.fhwa.dot.gov/> Click on Legislation and Regulations, then FHWA Directives and Policy Memorandums, then FHWA Technical Advisories, then T6640.

**750.01.02 FHWA Watersheds, Water Quality, and Storm water Runoff.** Abstracts of documents produced by or for the FHWA regarding water quality, stormwater runoff, and watersheds are available online. These include the *National Highway Runoff Water-Quality Data and Methodology Synthesis*, USEPA's site on the Clean Water Initiative, basic definition of watershed and watershed management, USEPA's Surf Your Watershed, and FHWA documents,

brochures, and other products. <http://www.fhwa.dot.gov/> Click on FHWA Programs, then Environment, then Water Quality and Storm water Runoff (under Natural Resources), or also Watersheds.

**750.01.03 FHWA Environmental Guidebook.** FHWA online Environmental Guidebook contains several guidance documents and federal MOAs on topics related to water quality, the Clean Water Act, and coastal zone management. Available via FHWA's web site: <http://www.fhwa.dot.gov/> Click on FHWA Programs, then Environment, then Environmental Guide-book, then Water Quality and the Clean Water Act, or Section 404 Permits, or by direct link <http://environment.fhwa.dot.gov/guidebook/index.htm>.

#### **750.02 DEQ Guidance.**

**750.02.01 Impaired and Threatened 303(d) Water bodies.** The State of Idaho is required to identify its polluted water bodies every two years and submit the 303(d) list to USEPA. The list is comprised of “water quality limited” estuaries, lakes, and streams that fall short of state surface water quality standards, and which are not expected to improve within the next two years. USEPA requires the state to set priorities for cleaning up threatened waters and to establish a Total Maximum Daily Load (TMDL) for each. A TMDL, or water cleanup plan, entails an analysis of pollutant loadings to determine how much pollution a water body can take and still remain healthy for its intended beneficial uses. The cleanup plan also includes recommendations for controlling the pollution as well as a monitoring plan to verify compliance with established TMDLs. For certain water bodies, TMDLs have been set; for others, TMDLs are being developed by DEQ.

Once developed, the TMDLs are tied to COE Section 404 and 401 water quality permit requirements. The DEQ web site provides access to a list of approximately 650 water bodies currently identified as impaired or threatened. The list identifies the locations of the water bodies, the water quality standards each exceeds, and by how much the standards are exceeded. Idaho’s Final 1998 Section 303(d) list of Impaired and Threatened Water bodies is online via: [Total Maximum Daily Load \(TMDL\) Resource Locator](#).

**750.02.03 Water Quality 305(b) Report.** The State of Idaho is required to prepare a water quality assessment report every five years and submit it to USEPA. In addition, USEPA requires the state to submit certain assessment data annually for compilation in a national report. The requirements are administered by DEQ.

For access to the data and a description of requirements for eco-regions, stream/river basins, estuaries, and lakes, refer to the 1998 Idaho State Water Quality Assessment Section 305(b) Report on DEQ web site: [Portal to Idaho's Department of Environmental Quality Website](#). The 303(d) polluted waters action is an assessment and the 305(b) is the report on that assessment. The two are now combined into a document called the “Integrated Report” for Federal reporting purposes.

#### **750.03 Other Water Quality Guidance.**

**750.03.01** Northwest Power Planning Council @ <http://www.nwcouncil.org>

**750.03.02** Watershed Map of Idaho @ <http://cfpub.epa.gov/surf/state.cfm?statepostal=ID>



## SECTION 760.00 – PERMITS AND APPROVALS

Each water quality permit or approval listed in this section should be considered for relevance during ITD project development. The chart below is a summary of water-related permits, certificates, and approvals, listed in the order of federal, state, then local. If ITD is in compliance with water quality permits, then it is in compliance with water quality standards.

Permit/Approval	Agency	Activity	Authority
COE		Any obstruction, alteration, or improvement	33 USC 401
Section 10	COE	of any navigable water, including re-channeling piers, wharfs, dolphins and, bulkheads	33 CFR 330.5 and 330.6
COE and Section 404	COE	Any discharging, dredging or placing of fill material in waters of the US and adjacent wetlands.	Sec. 404 of CWA, 33 USC 1344, 33CFR 330.5, and 330.6
COE, Sec. 404 of CWA, and Sec. 404 NWP	COE	NWP information is presented in a 1997(& subsequent) joint public notice issued by COE, EPA. A total of 40 33 USC 1344 NWPs for a range of activities in waters of the US are described	33 USC 1344, 33 CFR, and 330.6
Coast Guard, Section 9, and Bridge Permit	Coast Guard	Any work on bridges and causeways in navigable waters or waters that are susceptible to improvement for transporting inter-state or foreign commerce, or waters that are used by boats 21 feet or longer.	Sec. 9 of CWA, 33 USC 401, 33 CFR 114/115; Fed Aid Highway Act of 1987, 123(b)
Water Quality and 401 Certification	DEQ*	Any activity requiring a federal permit or license for discharging into waters must receive certification from DEQ that the discharge complies with State standards.	33 USC 1341 and 33 CFR 320.4
National Pollution Discharge Elimination System	EPA	Any activity discharging pollutants from a point source into surface waters or ground waters of the state. Individual and general permits are Issued by DEQ.	33 USC 1342
NPDES Storm water Construction Permit	EPA	Construction activities involving more than five acres.	33 USC 1342
NPDES Sand and Gravel General Permit	EPA	Discharges of process water and storm water associated with sand/gravel or quarry operations.	33 USC 1342

\*Idaho Department of Environmental Quality

The listing of salmonids under the Endangered Species Act (ESA) has triggered the development of new requirements for water quality issues. Planning processes under the ESA and the CWA are becoming increasingly integrated. USEPA, USFWS, National Marine Fisheries Service (NMFS), and DEQ are working to ensure that Idaho's water quality permits and procedures meet the goals and requirements of the ESA.

As a result, regulations relating to threatened and endangered salmonids are presently in the process of being incorporated into permits related to the CWA. In turn, ITD is incorporating ESA-related issues into its water quality procedures and design standards. Information in this section characterizes permits in a general manner. The permitting agency should be contacted for a more detailed analysis of individual permits, particularly due to the listing of salmonids under the ESA. The salmonid listing is likely to connect ESA with water quality permits.

#### **760.01 Corps of Engineers (COE) Section 10 Permits.**

**Agency Responsible** – COE, Walla Walla , Regulatory Branch.

**Regulated Activities** – This permit is required for any obstruction, dredging, alteration, or improvement of any navigable water, including re-channeling, piers, wharves, dolphins, bulkheads, and buoys. The purpose of the permit is to prevent obstructions to navigation. Navigable waters are those waters of the United States that are subject to tidal action shoreward to mean high water, or are used, have been used, or are susceptible to use in interstate or foreign commerce. In Idaho navigable waters include:

- Bear Lake
- Clark Fork River upstream to River Mile 4
- Clearwater River upstream to River Mile 40
- North Fork Clearwater River upstream to River Mile 57.9
- Kootenai River from Bonners Ferry to the Canadian border
- Pack River upstream to River Mile 1.5
- Pend Oreille Lake to elevation 2062.5
- Pend Oreille River (ID-WA border upstream to NPRR bridge at Sandpoint)
- Snake River upstream to River Mile 445.5

**Statutory Authority** – Section 10 of the Rivers and Harbors Act; 33 CFR 330.5 and 330.6.  
<http://www.sac.usace.army.mil/permits/33cfr330.html>

#### **760.02 Corps of Engineers (COE) Section 404 Permits.**

**Agency Responsible** – COE Walla Walla Regulatory Branch. The Coast Guard issues 404 permits for bridges over navigable waters.

**Regulated Activities and Requirements** – A CWA Section 404 permit is required for discharging, dredging, or placing fill material within waters of the U.S., including wetlands. The purpose of the permit is to prevent water quality degradation. Activities regulated under the 404 program include water resource projects (such as dams and berms), and infrastructure development (such as highways and airports). A 404 permit is not required to maintain structures or drainage ditches, but may be required to construct temporary sedimentation basins. The Seattle office processes any plans for activity for the navigable waters of Northern Idaho.

The COE also regulates non-navigable waters for the entire state under Section 404. Certain activities and work can be authorized by general 404 Nationwide permits (NWP), which are issued on a national, regional, or state basis for particular categories of activities (for example, minor road crossings and utility line backfill). General nationwide permits are usually granted for projects that have only minimal adverse effects on the waters of the state. Individual permits are usually required for activities that potentially have significant impacts or impact wetlands larger than one half acre. Both Individual and Nationwide Permits require compliance with the ESA. At a pre-application conference ITD, FHWA and the COE decide whether or not an Individual/Nationwide permit is required for a proposed project. A pre-application conference should be held for projects with potential impacts. Information on permits can be viewed at: [http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=Home\\_Page](http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=REG&pagename=Home_Page) Click on Permits, then When do I need a Permit from the Corps

The web site listed above also provides information on dredged material characterization: Look under Dredge Material Management.

**760.02.01 COE Individual 404 Permits.** The program is administered jointly by USEPA and COE. In addition, USFWS, NMFS, and state agencies have important review roles. Permits are submitted to the COE. Individual permits are issued following a full public interest review of an individual application. After evaluating all comments and information received, final decision on the application is made.

The permit decision is generally based on the outcome of a public interest balancing process where the benefits of the project are balanced against the detriments. A permit will be granted unless the proposal is found to be contrary to the public interest.

For individual permits, plans (drawings) must be submitted on 8.5 by 11-inch paper because they are used for public notice. Individual permits are required for Section 404 dredge disposal and filling project activities not covered by a NWP. An Individual 404 Permit is processed through the public interest review procedures, including public notice and receipt of comments. Citizens may request that the COE conduct a public hearing. The COE Statement of Finding document describes how the permit decision was made.

**Statutory Authority** – Section 404 of the Clean Water Act; 33 CFR 330.5 and 330.6.

**760.02.02 COE Nationwide Permits.**

Nationwide Permits (NWPs) are issued when the project will impact less than 5 acres of Waters of the U.S. The NWPs that commonly apply to ITD projects are:

- 3 - Maintenance
- 6 - Survey Activities
- 12 – Utility Lines Activities
- 13 - Bank Stabilization
- 14 - Linear Transportation Crossing
- 18 - Minor Discharges
- 20 – Oil Spill Cleanup
- 23 - Approved Categorical Exclusions
- 27 - Stream and Wetland Restoration Activities
- 33 - Temporary Construction, Access, and Dewatering
- 41 - Reshaping Existing Drainage Ditches
- 43 - Stormwater Management Facilities
- 45 – Repair of Uplands from Discrete Events

## 46 – Discharge in Ditches

NWPs were modified March 12, 2007. Permit applicants can view the latest permit requirements and District conditions on the Seattle COE web site: <http://www.nws.usace.army.mil/>.

For a complete list of permits see *Exhibit 700-5*.

**Statutory Authority** – Section 404 of the Clean Water Act; 33 CFR 330.5 and 330.6; and Section 10 of the Rivers and Harbors Act (33 USC 403)

### **760.03 Coast Guard Section 9 Bridge Permit.**

**Agency Responsible** – U.S. Coast Guard

**Regulated Activities and Requirements** – This permit is necessary for work done on bridges and causeways in navigable waters or waters that are susceptible to improvement for transporting interstate or foreign commerce, or waters that are tidal and used by boats 21 feet or more in length. Lighted structures in water that are used as navigational aids are subject to this permit.

A Section 9 Bridge Permit requires a CWA Section 401 certification issued by DEQ. The permit approval is also subject to other permits such as the 404 permit or Idaho Department of Lands approval. Plans (drawings) must be submitted on 8.5- by 11-inch paper because they go to public notice. ITD should notify DEQ early on when applying for a 401 certification because public notice is required before issuance. The public notice requires the Idaho standard minimum 30 day comment period.

**Statutory Authority** – 33 USC 11; 33 CFR 114 and 115; Federal Aid Highway Act of 1987, Section 123(b).

### **760.04 Water Quality Certification (CWA Section 401).**

**Agency Responsible** – DEQ Headquarters, Federal Permits Unit. USEPA's Aquatic Resources Unit issues certifications on tribal and federal land.

**Regulated Activities** – Federal and state permits, such as COE Section 404 permits, that involve discharge into waters of the United States (including wetlands) are sent to DEQ for a certification of compliance with state water quality standards and other aquatic protection laws, including TMDLs. The federal or state agency can request the 401 Certification on behalf of ITD following receipt of relevant permit applications.

ITD notifies DEQ's Environmental Review Section of COE Individual 404 Permits and Nationwide Permits (NWPs). ITD should notify DEQ early on when applying for a 404 Individual or Nationwide Permit so the DEQ 401 certification review and 20-day public notice can start prior to issuance of a COE final permit decision. Please see COE web site below to find current Section 401 conditions for new and revised NWPs.

(See <http://www.nap.usace.army.mil/cenap-pa/CENAP-OP-R-NWP3.htm>)

**Statutory Authority** – CWA Section 401. (*Exhibit 700-3*)

## **760.05 NPDES Permit, Section 402.**

**Agency Responsible** – The DEQ issues 401 certification for these permits that are issued under authority of the USEPA

**Regulated Activities and Requirements** – The discharge of pollutants into waters of the U.S., including wetlands and groundwater, is regulated through NPDES permits. Permits typically place limits on the quantity and concentration of pollutants that may be discharged. To ensure compliance with these pollutant concentration limits, permits require wastewater treatment or impose other operational conditions.

In most cases, permits have a five-year life span. Some ITD projects may require an individual NPDES permit for construction; however, NPDES permits applicable to most ITD projects fall under the category of Phase I general permits: Municipal Stormwater Discharge (based on municipal boundaries), Stormwater Associated with Construction Activity (project specific), Sand and Gravel General Permit. The following descriptions describe these permits more fully:

**Statutory Authority** – Federal Clean Water Act Section 402. ([Exhibit 700-2](#))

**760.05.01 Municipal Stormwater Discharge Permit.** ITD is required to partner with cities to obtain coverage under NPDES municipal stormwater permits to control stormwater discharges during construction and for the long-term operation and maintenance of its facilities. The permits cover city-operated municipal separate storm sewers that are located within permitted municipalities

Currently Phase I permits are limited to municipalities of 100,000 and over. In March of 2003, Phase II permits will become effective and regulate cities of 50,000 and over in drier areas and cities of 10,000 and over in wetter areas. In instances of extreme pollution discharged (for instance mine waste into pristine streams) there may be no population size limit. Exact details of the requirements will be issued when the Phase II permit becomes operational.

These municipal permits are watershed specific but include only to the extent of the city municipal boundary. The permits authorize stormwater discharges into ground and surface waters during a five-year period. ITD currently partners in coverage for one watershed area, the city of Boise.

**Statutory Authority** – Clean Water Act Section 402.

**760.05.02 Stormwater Construction Permit.** This General Permit to Discharge Stormwater Associated with Construction Activity is required for stormwater discharges resulting from construction activities. Considerable information regarding these permits can be found on the EPA website: “EPA Region 10 Wastewater Discharge Permits (NPDES) Unit”. The actual link is extremely long and complex, so only the description of the website is given here.

This permit is administered by DEQ to regulate stormwater discharge on construction sites for each project that disturbs one acre or more. (This requirement was reduced from five acres on March 3, 2003.) Information and forms can be obtained from the DEQ web site listed below.

Application for the permit is made by completion of a single sheet form called a Notice of Intent for Construction Activity (NOI). DEQ reviews the NOI to determine if the project should be covered under the general permit or an individual permit. The permit requires development of a

Stormwater Pollution Prevention Plan (SWPPP) that identifies BMPs to prevent surface water and groundwater pollution.

*Statutory Authority – Federal Clean Water Act Section 402.*

## **SECTION 770.00 – NON-ROAD PROJECT REQUIREMENTS**

**770.01 Airports, Rail, and Non-Motor.** Airport, rail, and non-motorized projects are generally subject to the same water quality policies, procedures, and permits as for road projects. In rail projects, railroad fills, including ties, rails, and structures over streams are considered impervious. To prevent materials falling off trains into water bodies, enclosed structures must be used to transport materials.

## **SECTION 780.00 – EXHIBITS**

### ***Exhibit 700-1 Section 303(d) – Tribal/State/Federal Coordination***

#### **What is Section 303(d) of the Clean Water Act?**

Section 303(d) of the Clean Water Act requires and outlines a process to identify waters that do not meet state and/or tribal standards. It also sets priorities and requires quantitative analysis of water quality problems and contributing pollution sources.

#### **The benefits of tribal, state, and federal coordination on Clean Water Act Section 303(d) activities include:**

- Improving the 303(d) listing process in the State of Idaho to include government-to-government processes with Indian tribes;
- Cooperating to address water quality problems on a watershed basis, recognizing areas
- where tribes have retained rights under treaties;
- Forming working relationships to solve water quality problems;
- Addressing cross-government jurisdiction water quality problems by watershed through a step-by-step process;
- Preserving state and tribal legal and administrative options and jurisdictions;
  - providing opportunities for tribes and the U.S. Environmental Protection Agency (EPA) to work together to meet requirements of the Clean Water Act on reservations;
- Coordinating funding for water quality improvement projects; and
- Pulling together state, tribal, and federal water quality decision-making.

#### **The limitations of Section 303(d) include:**

- Requirements of Section 303(d) can be a staff, time, and money intensive process for the Idaho State Department of Ecology, tribal natural resources programs, and EPA, and
- Lack of concrete guidance in the Clean Water Act about controlling pollution sources such as those resulting from forest and agricultural practices.

#### **What would coordinating Section 303(d) efforts mean?**

Tribal, DEQ, and EPA technical and/or policy staff would meet at specific points during the 303(d) process to identify concerns and arrive at solutions. The primary focus would be on specific watersheds and take place at the staff level. If agreements could not be reached on an

important issue, a formal mediation could take place. If the tribe, Ecology, nor EPA would give up its decision-making authority, final decisions would rest with the government vested with the decision-making responsibility

Specific opportunities for cooperative involvement rest with the needs and resources of each tribe, Ecology, and EPA. Possible activities include joint monitoring, report writing, grant requests, policy development, local community involvement, data review, on-the-ground cleanup activities, and site inspections. Agreements specifying the nature of the desired working relationships among the tribe, Ecology, and EPA could be formalized through memorandums of understanding, or less formal approaches could be taken.

**Exhibit 700-2** ( For updates on the NPDES requirements:)

[http://cfpub.epa.gov/npdes/whatsnew.cfm?program\\_id=0](http://cfpub.epa.gov/npdes/whatsnew.cfm?program_id=0)

**TITLE 33 > CHAPTER 26 > SUBCHAPTER IV > Sec. 1342.**

**Sec. 1342. - National pollutant discharge elimination system**

**(a)** Permits for discharge of pollutants

**(1)**

Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

**(A)**

all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or

**(B)**

prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

**(2)**

The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

**(3)**

The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

**(4)**



All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

**(5)**

No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

**(b) State permit programs**

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

**(1)**

To issue permits which -

**(A)**

apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

**(B)**

are for fixed terms not exceeding five years; and

**(C)**

can be terminated or modified for cause including, but not limited to, the following:

**(i)**

violation of any condition of the permit;

**(ii)**

obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

**(iii)**

change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

**(D)**

control the disposal of pollutants into wells;

**(2)**

**(A)**

To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

**(B)**

To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

**(3)**

To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

**(4)**

To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

**(5)**

To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

**(6)**

To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

**(7)**

To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

**(8)**

To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure

compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of

**(A)**

new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants,

**(B)**

new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or

**(C)**

a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

**(9)**

To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

**(c)** Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

**(1)**

Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

**(2)**

Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

**(3)**

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

**(4) Limitations on partial permit program returns and withdrawals. -**

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of -

**(A)**

a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

**(B)**

a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

**(d) Notification of Administrator**

**(1)**

Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

**(2)**

No permit shall issue

**(A)**

if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or

**(B)**

if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

**(3)**

The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

**(4)**

In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

**(e) Waiver of notification requirement**

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

**(f) Point source categories**

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

**(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants**

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

**(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works**

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

**(i) Federal enforcement not limited**

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

**(j) Public information**

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

**(k) Compliance with permits**

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a

permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of

(1)

section 1311, 1316, or 1342 of this title, or

(2)

section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

**(l) Limitation on permit requirement**

**(1) Agricultural return flows**

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

**(2) Stormwater runoff from oil, gas, and mining operations**

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

**(m) Additional pretreatment of conventional pollutants not required**



To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

**(n) Partial permit program**

**(1) State submission**

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

**(2) Minimum coverage**

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

**(3) Approval of major category partial permit programs**

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if -

**(A)**

such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

**(B)**

the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

**(4) Approval of major component partial permit programs**

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if -

**(A)**

the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

**(B)**

the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

**(o) Anti-backsliding**

**(1) General prohibition**

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

**(2) Exceptions**

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if -

**(A)**

material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify

the application of a less stringent effluent limitation;

**(B)**

**(i)**

information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

**(ii)**

the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

**(C)**

a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

**(D)**

the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

**(E)**

the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise

unrelated to water quality.

**(3) Limitations**

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

**(p) Municipal and industrial stormwater discharges**

**(1) General rule**

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

**(2) Exceptions**

Paragraph (1) shall not apply with respect to the following stormwater discharges:

**(A)**

A discharge with respect to which a permit has been issued under this section before February 4, 1987.

**(B)**

A discharge associated with industrial activity.

**(C)**

A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

**(D)**

A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

**(E)**

A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

**(3) Permit requirements**

**(A) Industrial discharges**

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

**(B) Municipal discharge**

Permits for discharges from municipal storm sewers -

**(i)**

may be issued on a system- or jurisdiction-wide basis;

**(ii)**

shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

**(iii)**

shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

**(4) Permit application requirements**

**(A) Industrial and large municipal discharges**

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide

for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

**(B) Other municipal discharges**

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

**(5) Studies**

The Administrator, in consultation with the States, shall conduct a study for the purposes of -

**(A)**

identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

**(B)**

determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

**(C)**

establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

**(6) Regulations**

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5))

which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum,

**(A)**

establish priorities,

**(B)**

establish requirements for State stormwater management programs, and

**(C)**

establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

**(q) Combined sewer overflows**

**(1) Requirement for permits, orders, and decrees**

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the "CSO control policy").

**(2) Water quality and designated use review guidance**

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

**(3) Report**

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy

**Exhibit 700-3**

**TITLE 33 > CHAPTER 26 > SUBCHAPTER IV > Sec. 1344.**

**Sec. 1344. - Permits for dredged or fill material**

**(a) Discharge into navigable waters at specified disposal sites**

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

**(b) Specification for disposal sites**

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary

**(1)**

through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and

**(2)**

in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

**(c) Denial or restriction of use of defined areas as disposal sites**

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.



**(d) "Secretary" defined**

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

**(e) General permits on State, regional, or nationwide basis**

**(1)**

In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall

**(A)**

be based on the guidelines described in subsection (b)(1) of this section, and

**(B)**

set forth the requirements and standards which shall apply to any activity authorized by such general permit.

**(2)**

No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

**(f) Non-prohibited discharge of dredged or fill material**

**(1)**

Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material -

**(A)**

from normal farming, silviculture, and ranching activities such

as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

**(B)**

for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

**(C)**

for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

**(D)**

for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

**(E)**

for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

**(F)**

resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

**(2)**

Any discharge of dredged or fill material into the navigable waters

incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

**(g) State administration**

**(1)**

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

**(2)**

Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

**(3)**

Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

**(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program**

**(1)**

Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

**(A)**

To issue permits which -

**(i)**

apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

**(ii)**

are for fixed terms not exceeding five years; and

**(iii)**

can be terminated or modified for cause including, but not limited to, the following:

**(I)**

violation of any condition of the permit;

**(II)**

obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

**(III)**

change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

**(B)**

To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect,

monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

**(C)**

To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

**(D)**

To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

**(E)**

To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

**(F)**

To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

**(G)**

To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

**(H)**

To assure continued coordination with Federal and Federal-State water-related planning and review processes.

**(2)**

If, with respect to a State program submitted under subsection

(g)(1) of this section, the Administrator determines that such State -

**(A)**

has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify

**(i)**

such State and

**(ii)**

the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

**(B)**

does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

**(3)**

If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

**(4)**

After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

**(5)**

Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

**(i) Withdrawal of approval**

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall

**(1)**

withdraw approval of such program until the Administrator determines such corrective action has been taken, and

**(2)**

notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

**(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator**

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator

**(1)**

a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and

**(2)**

a copy of each proposed general permit which such State intends to

issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects

**(A)**

to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or

**(B)**

to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

**(k) Waiver**

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the



requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

**(l) Categories of discharges not subject to requirements**

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

**(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service**

States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that

**(1)**

an application for a permit under subsection (a) of this section has been received by the Secretary, or

**(2)**

the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

**(n) Enforcement authority not limited**

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

**(o) Public availability of permits and permit applications**

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

**(p) Compliance**

Compliance with a permit issued pursuant to this section, including any

activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

**(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements**

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

**(r) Federal projects specifically authorized by Congress**

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

**(s) Violation of permits**

**(1)**

Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

**(2)**

A copy of any order issued under this subsection shall be sent

immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

**(3)**

The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action <sup>[1]</sup> shall be given immediately to the appropriate State.

**(4)**

Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

**(t) Navigable waters within State jurisdiction**

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation

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[1] So in original. Probably should be "action".

**Sec. 1341. - Certification**

**(a)** Compliance with applicable requirements; application; procedures; license suspension

**(1)**

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

**(2)**

Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that

such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

**(3)**

The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections [1311](#), [1312](#), [1313](#), [1316](#), and [1317](#) of this title because of changes since the construction license or permit certification was issued in

**(A)**

the construction or operation of the facility,

**(B)**

the characteristics of the waters into which such discharge is made,

**(C)**

the water quality criteria applicable to such waters or

**(D)**

applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation

of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

**(4)**

Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

**(5)**

Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

**(6)**

Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

**(b) Compliance with other provisions of law setting applicable water quality**

## requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

### **(c)** Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

### **(d)** Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section

## ***Exhibit 700-5***

NWP 401 & CZC General Conditions

Certified March 15, 2002

### **Nationwide Permit 401 and CZC General Conditions**

**Certified March 15, 2002**

General Conditions: These conditions apply to all of the nationwide permits (NWP) unless otherwise noted. A project proposed for authorization under a nationwide permit should not be considered unless it meets all of the following general conditions plus any special conditions listed for each NWP.

1. DHEC considers a "single and complete project" to mean the overall project proposed or accomplished by a single owner/developer and it includes all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by each NWP request. Impacts to Geographical Areas of Particular Concern (GAPC) sites or adjacent waterbodies or wetlands resulting from an activity will be considered during the review of these actions.
2. After the fact applications for NWPs will generally not be accepted by DHEC.
3. The nationwide permits are not applicable to Outstanding Resource Waters, Trout Waters (as defined in R. 61-68) or aquatic sites located adjacent to those areas. The nationwide permits are also not applicable to springheads.
4. The nationwide permits are not applicable to areas identified by SCDHEC as having impaired uses (as defined by 303(d) of the Clean Water Act).
5. The applicant must implement best management practices during construction to minimize erosion and migration of sediments off site. These practices may include use of mulches, hay bales, silt fences, or other devices capable of preventing erosion and migration of sediments. These devices must be maintained in a functioning capacity until the area is permanently stabilized upon project completion. All disturbed land surfaces must be stabilized upon project completion.
6. Upon project completion, all disturbed riverbeds, stream/creekbeds and/or wetlands must be restored to their original contours and conditions to the maximum degree practicable. Also, all disturbed upland areas must be permanently stabilized with a vegetative cover (native species). This may include sprigging, trees, shrubs, vines or ground cover. Also, wetlands should be revegetated, if necessary.



7. Only clean earthen material free of all potential sources of pollution must be used as fill and all filled areas must be stabilized with a vegetative cover after construction to minimize erosion.
8. All necessary measures must be taken to prevent oil, tar, trash, debris and other pollutants from entering the adjacent waters or wetlands.
9. All excess excavated materials must be placed on high land and properly contained and permanently stabilized to prevent erosion.
10. Excavated material must not be stockpiled in the adjacent wetlands, but placed on barges or on high ground, when possible. If the excavated material is temporarily placed in wetlands, it must be placed at intervals to allow for adequate circulation of water in the adjacent waters, including wetlands.
11. The applicant must comply with any approved County Erosion and Sediment Control and/or Stormwater Ordinances.
12. Any equipment used within the wetland must be equipped with high floatation tires to minimize rutting and compaction, or should be operated from floating barges.
13. Once project construction is initiated, it must be carried to completion in an expeditious manner in order to minimize the period of disturbance to the environment.
14. All nationwide permit applications must be accompanied by a Corps of Engineers wetland delineation or approximation identifying all wetlands (jurisdictional and nonjurisdictional), depressional areas or other special aquatic sites within the project area.
15. For projects requiring fill in wetlands, the applicant must demonstrate that impacts to wetlands have been avoided, unavoidable impacts to wetland areas have been minimized, and finally provide suitable compensation for any unavoidable wetland impacts. This sequencing should be presented in all permit applications. Additional sequencing regarding appropriate compensation (onsite, within watershed, outside watershed, etc.) must also be demonstrated. Where compensatory mitigation is required, on-site mitigation, in accordance with the provisions of the S. C. Coastal Zone Management Program in the Coastal Zone, must be pursued if at all possible. Compensatory mitigation must be determined using the USACOE Standard Operating Procedure (SOP), and is required for all impacts (permanent and/or temporary) to waters of the U.S. greater than 0.1-acre and stream impacts greater than 50 linear feet

unless waived by SCDHEC.

Mitigation plans must be included in the application submitted to the Corps of Engineers by the applicant and in the Nationwide Permit Certification Request letter forwarded to SCDHEC by the Corps. Proof of purchase of mitigation credits or execution of the deed restriction, restrictive covenant, or conservation easement document, if part of the submitted mitigation plan, must be submitted to both the Corps of Engineers and SCDHEC within 60 days of issuance of the nationwide permit by the Corps of Engineers. Although the permit may be issued pending resolution of a mitigation plan, the work authorized by that permit may not commence until the mitigation plan is approved and finalized.

16. The Permittee must notify the South Carolina Institute of Archaeology and Anthropology in accordance with South Carolina Underwater Antiquities Act of 1991 (Article 5, Chapter 7, Title 54 Code of Laws of South Carolina, 1976) in the event archaeological or paleontological remains are found during the course of work. Archaeological remains consist of any materials made or altered by man which remain from past historic or prehistoric times (i.e., older than 50 years).

Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or nonrecent (i.e., older than 100 years) vessel ruins. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

17. Permittee must notify the South Carolina Department of Archives and History (Historic Preservation Division, Post Office Box 11669, Columbia, South Carolina 29211) if any archaeological materials are unearthed prior to or during construction. Archaeological materials consists of any items, fifty years or older, which were made or used by man. These items include, but are not limited to stone projectile points (arrowheads), ceramic sherds, bricks, worked wood, bone and stone, metal and glass objects, and human skeleton remains. These materials may be present on the ground surface and/or under the surface of the ground.

18. Use of multiple NWPs on one tract or land parcel must be in accordance with 33 CFR Appendix C – General Condition #15. In those instances where a PCN is required to be submitted to the Corps (use of NWP 12 - 40 in combination with another NWP 12 - 40), a Nationwide Permit Certification Request letter must be submitted to DHEC for concurrence.

19. Activities in the Critical Areas (as defined in 48-39-10, R 30.1(D) and R 30.10) require a direct permit from SCDHECOCRM. OCRM's action on direct critical area permits will serve as its consistency

determination for the critical area activity.

## Nationwide Permit General Conditions

March 9, 1990

The following General Conditions must be followed in order for any authorization by an NWP to be valid:

1. *Navigation.* No activity may cause more than a minimal adverse effect on navigation.
2. *Proper Maintenance.* Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.
3. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.
4. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life-cycle movements of those species of aquatic life indigenous to the water body, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.
5. *Equipment.* Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.
6. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state or tribe in its Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination.
7. *Wild and Scenic Rivers.* No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).
8. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.
9. *Water Quality.* (a) In certain states and tribal lands an individual 401 Water Quality Certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the state or tribal 401 certification (either generically or individually) does not require or approve water quality management measures, the permittee must provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality (or the Corps determines that compliance with state or local standards, where applicable, will ensure no more than minimal adverse effect on water quality). An important component of water quality management includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality (refer to General Condition 21 for stormwater management requirements). Another important component of water quality management is the establishment and maintenance of vegetated buffers next to open waters, including streams (refer to General Condition 19 for vegetated buffer requirements for the NWPs).

This condition is only applicable to projects that have the potential to affect water quality. While appropriate measures must be taken, in most cases it is not necessary to conduct detailed studies to identify such measures or to require monitoring.

10. *Coastal Zone Management.* In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see 33 CFR 330.4(d)).

11. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the *notification* must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(b) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the USFWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the USFWS and NMFS or their world wide web pages at

[http://www.nmfs.noaa.gov/prot\\_res/overview/es.html](http://www.nmfs.noaa.gov/prot_res/overview/es.html).

12. *Historic Properties.* No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the *notification* must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. *Notification.*

(a) Timing; where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction *notification* (PCN) as early as possible. The District Engineer must determine if the *notification* is complete within 30 days of the date of receipt and can request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the *notification* is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified in writing by the District or Division Engineer that an Individual Permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete *notification* and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Notification: The *notification* must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), Regional General Permit(s), or Individual Permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7 (Outfall Structures and Maintenance), the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed;

(6) For NWP 14 (Linear Transportation Projects), The PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the US and a statement describing how temporary losses of waters of the US will be minimized to the maximum extent practicable;

(7) For NWP 21 (Surface Coal Mining Activities), the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan, if applicable. To be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing;

(8) For NWP 27 (Stream and Wetland Restoration Activities), the PCN must include documentation of the prior condition of the site that will be reverted by the permittee;

(9) For NWP 29 (Single-Family Housing), the PCN must also include:

(i) Any past use of this NWP by the Individual Permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring ¼-acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than ¼-acre in size, formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(10) For NWP 31 (Maintenance of Existing Flood Control Facilities), the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information identifying the approved channel depths and configurations and existing facilities.

- Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;
- (ii) A delineation of any affected special aquatic sites, including wetlands; and,
    - (iii) Location of the dredged material disposal site;
    - (11) For NWP 33 (Temporary Construction, Access, and Dewatering), the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources;
    - (12) For NWPs 39, 43 and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization for losses of waters of the US were achieved on the project site;
    - (13) For NWP 39 and NWP 42, the PCN must include a compensatory mitigation proposal to offset losses of waters of the US or justification explaining why compensatory mitigation should not be required. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;
    - (14) For NWP 40 (Agricultural Activities), the PCN must include a compensatory mitigation proposal to offset losses of waters of the US. This NWP does not authorize the relocation of greater than 300 linear-feet of existing serviceable drainage ditches constructed in non-tidal streams unless, for drainage ditches constructed in intermittent non-tidal streams, the District Engineer waives this criterion in writing, and the District Engineer has determined that the project complies with all terms and conditions of this NWP, and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;
    - (15) For NWP 43 (Stormwater Management Facilities), the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with state and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the US. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;
    - (16) For NWP 44 (Mining Activities), the PCN must include a description of all waters of the US adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the US, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities in isolated waters and non-tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities);
    - (17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work; and
    - (18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.
  - (c) *Form of Notification:* The standard Individual Permit application form (Form ENG 4345) may be used as the *notification* but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)-(18) of General Condition 13. A letter containing the requisite information may also be used.
  - (d) *District Engineer's Decision:* In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process. The District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary. The District Engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.
- If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then the District Engineer will notify the applicant either: (1) that the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an Individual Permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic

environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the US will occur until the District Engineer has approved a specific mitigation plan.

(e) *Agency Coordination*: The District Engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWP and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

For activities requiring *notification* to the District Engineer that result in the loss of greater than 1/2-acre of waters of the US, the District Engineer will provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy to the appropriate Federal or state offices (USFWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the *notification*. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each *notification* that the resource agencies' concerns were considered. As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to NMFS within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of *notifications* to expedite agency *notification*.

(f) *Wetland Delineations*: Wetland delineations must be prepared in accordance with the current method required by the Corps (For NWP 29 see paragraph (b)(9)(iii) for parcels less than 1/4-acre in size). The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. *Compliance Certification*. Every permittee who has received NWP verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include: (a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. *Use of Multiple Nationwide Permits*. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the US authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit (e.g. if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the US for the total project cannot exceed 1/3-acre).

16. *Water Supply Intakes*. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. *Shellfish Beds*. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. *Suitable Material*. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the CWA).

19. *Mitigation*. The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) The project must be designed and constructed to avoid and minimize adverse effects to waters of the US to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland impacts requiring a PCN, unless the District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands as compensatory mitigation, with preservation used only in exceptional circumstances.

(d) Compensatory mitigation (i.e., replacement or substitution of aquatic resources for those impacted) will not be used to increase the acreage losses allowed by the acreage limits of some of the NWPs. For example, 1/4-acre of wetlands cannot be created to change a 3/4-acre loss of wetlands to a 1/2-acre loss associated with NWP 39 verification. However, 1/2-acre of created wetlands can be used to reduce the impacts of a 1/2-acre loss of wetlands to the minimum impact level in order to meet the minimal impact requirement associated with NWPs.

(e) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or

preserving similar functions and values, preferably in the same watershed.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., easements, deed restrictions) of vegetated buffers to open waters. In many cases, vegetated buffers will be the only compensatory mitigation required. Vegetated buffers should consist of native species. The width of the vegetated buffers required will address documented water quality or aquatic habitat loss concerns. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineers may require slightly wider vegetated buffers to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the Corps will determine the appropriate compensatory mitigation (e.g., stream buffers or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where vegetated buffers are determined to be the most appropriate form of compensatory mitigation, the District Engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland impacts.

(g) Compensatory mitigation proposals submitted with the “*notification*” may be either conceptual or detailed. If conceptual plans are approved under the verification, then the Corps will condition the verification to require detailed plans be submitted and approved by the Corps prior to construction of the authorized activity in waters of the US.

(h) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases that require compensatory mitigation, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

20. *Spawning Areas*. Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. *Management of Water Flows*. To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and provide for not increasing water flows from the project site, relocating water, or redirecting water flow beyond preconstruction conditions. Stream channelizing will be reduced to the minimal amount necessary, and the activity must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows. In most cases, it will not be a requirement to conduct detailed studies and monitoring of water flow.

This condition is only applicable to projects that have the potential to affect waterflows. While appropriate measures must be taken, it is not necessary to conduct detailed studies to identify such measures or require monitoring to ensure their effectiveness. Normally, the Corps will defer to state and local authorities regarding management of water flow.

22. *Adverse Effects From Impoundments*. If the activity creates an impoundment of water, adverse effects to the aquatic system due to the acceleration of the passage of water, and/or the restricting its flow shall be minimized to the maximum extent practicable. This includes structures and work in navigable waters of the US, or discharges of dredged or fill material.

23. *Waterfowl Breeding Areas*. Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. *Removal of Temporary Fills*. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

25. *Designated Critical Resource Waters*. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the US are not authorized by NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the US may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the USFWS or the NMFS has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, *notification* is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

26. *Fills Within 100-Year Floodplains*. For purposes of this General Condition, 100-year floodplains will be identified through the existing Federal Emergency Management Agency’s (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) Discharges in Floodplain; Below Headwaters. Discharges of dredged or fill material into waters of the US within the mapped 100-year floodplain, below headwaters (i.e. five cfs), resulting in permanent above-grade fills, are not authorized by

NWPs 39, 40, 42, 43, and 44.

(b) Discharges in Floodway; Above Headwaters. Discharges of dredged or fill material into waters of the US within the FEMA or locally mapped floodway, resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, and 44.

(c) The permittee must comply with any applicable FEMA-approved state or local floodplain management requirements.

27. *Construction Period.* For activities that have not been verified by the Corps and the project was commenced or under contract to commence by the expiration date of the NWP (or modification or revocation date), the work must be completed within 12-months after such date (including any modification that affects the project).

For activities that have been verified and the project was commenced or under contract to commence within the verification period, the work must be completed by the date determined by the Corps.

For projects that have been verified by the Corps, an extension of a Corps approved completion date may requested. This request must be submitted at least one month before the previously approved completion date.

**Further Information**

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project.